No. 5916

In the United States Circuit Court of Appeals for the Ninth Circuit

JAMES W. JORDAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The material facts may be briefly stated: The appellant, James W. Jordan, hereinafter called the insured, enlisted in the military service of the United States on February 5, 1918. On March 11, 1918, he applied for and there was granted to him $5,000 war risk term insurance. On June 1, 1918, he applied for and there was granted to him an additional $5,000 insurance. Premiums were paid through September, 1918. The insured was discharged September 4, 1918.

The insured in his complaint in Paragraph III alleged "that *prior to* and during the month of June, 1918, * * * plaintiff developed and became afflicted with epilepsy. That because of said

epilepsy plaintiff became on or about the 1st day of July, 1918, totally and permanently disabled * * *. (Emphasis ours.) (R. p. 3.)

The Government, defendant below and hereinafter called defendant, in its answer denied the foregoing allegations of the complaint. (Answer, Par. III, R. p. 8.)

At the conclusion of the testimony the Court charged the jury as follows:

> The policies provide that in the event the insured becomes totally and permanently disabled the United States will pay to him the sum of $57.50 per month, commencing at the date of such disability.
>
> Until the insured becomes totally and permanently disabled, it is necessary, to keep the policies in force, to pay the premiums thereon. In case the insured does become totally and permanently disabled while the policies are in force, then such disability matures the policy and no further premiums are required. (R. p. 18.)

The Court further instructed the jury:

> If you find that the plaintiff suffered from epilepsy between the dates of his entry into the service of the United States, February 5, 1918, and prior to the issuance to him of insurance by the Government, March 11, 1918, your verdict must be for the Government as to said contract of $5,000.00, for, if the plaintiff was suffering from the same affliction prior as after the insurance or the issuance of said insurance contract, he suf-

> fered no loss subsequent to the date of said contract. (R. p. 19.)

A like instruction was given as to the second contract which was issued effective June 1, 1918. (Bill of Exceptions, R. p. 20.)

Concluding his charge the Court submitted to the jury two special interrogatories:

> (1) Was the plaintiff permanently and totally disabled from epilepsy between the date of his entry into the service of the United States, February 5, 1918, and the date of his first insurance contract for $5,000?
>
> (2) Was the plaintiff permanently and totally disabled from epilepsy between the date of his entry into the service of the United States, February 5, 1918, and the date of his second insurance contract for $5,000?

With the submission of these two special interrogatories the Court instructed the jury that if their answer to the first interrogatory was in the affirmative—that is, that the plaintiff became permanently and totally disabled from epilepsy prior to the issuance of the first of the two insurance contracts—then the general verdict must be for the defendant, for "under those circumstances the plaintiff would have suffered no loss under the contract." The jury answered the first interrogatory in the affirmative and returned a general verdict for the defendant, on which judgment for the defendant was filed April 11, 1929.

ARGUMENT

The basic question in this case, stripped of its technical terminology, is this and nothing but this: Did the insured suffer loss under the contract? The insurance was granted "against death or total permanent disability" of the insured. (Section 400, Act of October 6, 1917, 40 Stat. 409.) The contract provided that the benefits of this insurance would be payable "to the insured, if he/she, while this insurance is in force, *shall become* totally and permanently disabled." (Bulletin No. 1, a regulation promulgated October 15, 1917, pursuant to Section 402 of the Act of October 6, 1917, 40 Stat. 409.)

It is plain, then, that the contract of insurance, as any other contract of insurance, was issued as an indemnity against future loss rather than against one which had already occurred. While the special interrogatory submitted to the jury was whether or not the insured was permanently and totally disabled prior to the respective dates of application for each contract of insurance, it is obvious that the inquiry of the Court was in effect directed to determining whether the insured's disability from epilepsy was incurred prior or subsequent to either or both of the applications for insurance, and it is equally obvious that the jury understood this to be the purpose of the court's inquiry, for the Court specifically called the attention of the jury to this matter in Instruction No. 1

and Instruction No. 2 requested by the defendant, in which the Court stated that if the insured was suffering "from the same affliction prior as after issuance of said insurance contract he suffered no loss subsequent to the date of the contract." (R. p. 12, 13.)

Regardless of the form, therefore, it is obvious that the jury found the insured suffered no loss covered by the insurance contracts during the time which they were kept in force and effect by the payment of premiums.

It will be noted that the record does not contain any suggestion that there was any evidence tending to show that there was any change or increase in the insured's disability from epilepsy during the period in controversy. On the contrary, the only inference that can be drawn from the record is that plaintiff's disability was the same during this entire period. In any event, no exception was noted to the court's ruling on this ground or any request that the jury be requested to make any finding regarding this matter.

The brief submitted in behalf of the insured does not specifically attempt to urge upon the Court that the insured is entitled to recover even though he suffered no loss during the life of the insurance contract, but attempts to evade that issue by asserting:

> 1. That the insured's physical condition at the time insurance was granted was immaterial;

2. That the policies became incontestable after expiration of six months; and

3. That the defendant is estopped to assert the invalidity of the policy.

The defendant admits that the insured's physical condition at the time insurance was granted is immaterial so far as the valid issue of a contract of insurance is concerned, but insists that the insured may not assert the identical condition which existed at the time insurance issued later constitutes a permanent and total disability.

After diligent search we have been unable to find any case in which insurance has been held payable for a loss occurring prior to the issue of insurance, except in certain well-known marine insurance cases, where insurance is issued against vessels expressly insured lost or not lost, and the loss is not known to either the insurer or the insured at the time such insurance is issued. It is well established, however, that if the loss be known to either party the insurance is void.

In the case of *Edward Martin Nold* v. *United States, unreported,* No. 1030 at Law, decided by the United States District Court for the Western District of Missouri, it appeared that the plaintiff while riding on horseback had fallen over a sharp declivity of nearly three hundred feet on November 3, 1917. From that time for a period of more than a year he was flat on his back in a hospital. On February 1, 1918, plaintiff made application for $10,000 war risk insurance. At the time of trial,

1928, the plaintiff, though still badly disabled, had some slight use of his arms and legs. The Court in directing a verdict for the Government said in part:

> If he (the plaintiff) was totally and permanently disabled after February 1, 1918, and is now totally and permanently disabled, witnesses' testimony that proves that, conclusively proves that he was totally and permanently disabled from the time of his injury, November 3, 1917. Concerning that no one can—concerning that conclusion no one can have any doubt at all; that is beyond argument.
>
> If he was totally and permanently injured after the date when he obtained this policy of insurance, February 1, 1918, he was totally and permanently disabled before that date, and from and after November 3, 1917, and for present purposes I will conclude that there is evidence to support that conclusion, to support the assumption that he was totally and permanently disabled soon after November 3, 1917.
>
> What, then, is the question which is now for determination? The question is, under facts of that kind is the plaintiff entitled to recover against the defendant, the Government? What did the Government insure him against? Against two things—death and against his becoming totally and permanently disabled. No one would contend, I suppose, that if by some trick of fate a policy of insurance were issued on a dead man, no one will contend that thereafter his

> beneficiaries could recover on that policy, because the insurance is against death after the policy and not before the policy is issued. The insurance here is against the plaintiff becoming totally and permanently disabled after he takes out the contract, not against a future of total and permanent disability which he had thereto.
>
> * * * * *
>
> A man can't—to use an illustration I have already used once—a man can't recover from a fire insurance company for the burning of a house when the house burned down before he got insurance; or for recovery on the loss of an arm on an accident policy when the arm was lost before he got insurance; nor from becoming totally and permanently disabled upon a war risk policy when he was totally and permanently disabled before he got the insurance.
>
> * * * * *
>
> My decision is not based upon the ground that the policy is contestable, but upon the ground that no loss has occurred, with reference to the time the policy was issued.

In the case of *Steve Oliver* v. *United States,* unreported, No. 254 at Law—Prescott, United States District Court for the District of Arizona, in directing a verdict for the defendant in a suit on a contract of war risk insurance, the Court said in part:

> I find that it becomes my duty, under the law and the evidence of this case, to instruct this jury to return a verdict in favor of the defendant, for the reason that the evidence

> fails to disclose a loss suffered by this plaintiff subsequent to the issuance of the policy. The evidence, in my judgment, shows that the plaintiff is in the same condition to-day that he was at the time that the policy was issued. The evidence of Dr. Allen was very clear and distinct on that. The evidence of Dr. McNally is to the effect that light employment would probably cure this plaintiff of the ailment existing prior to and at the time of the issuance of this policy, and this does not preclude the plaintiff from subsequently bringing an action on the policy, if he suffers a total and permanent disability from any cause arising subsequent to the 1st of November, 1925 (date of reinstatement of lapsed insurance).

In the case of *McCain* v. *Hartford Live Stock Ins. Co.,* 130 S. E. 186, 190 N. C. 549, a contract of insurance was issued covering the life of a mule which died two days before the policy was delivered and before it was countersigned. The Supreme Court of North Carolina, in holding that there could be no recovery under the policy, said in part:

> Parties would not knowingly make an insurance contract regarding a mule not in existence. The thing contemplated to exist and whose existence was an indispensable basis for their contemplated agreement had no existence; therefore there was no contract.

The attention of the Court is specifically invited to the fact that it is not the defendant in this case

who in the first instance asserted or made claim that the insured's condition from epilepsy was one of permanent and total disability. On the contrary, it is the insured who has asserted that he was permanently and totally disabled by reason of epilepsy on July 1, 1918. The record is silent as to whether or not the evidence as to the insured's condition was introduced by him or by the defendant. However, no objection seems to have been made by either party to the admission or exclusion of evidence and the petition of the insured alleges that his epilepsy developed on and prior to June, 1918. The second contract of insurance issued June 1, 1918. It was the contention of the Government that the insured was not permanently and totally disabled at any time while his insurance remained in force by reason of epilepsy or any other disease. The defendant contended, however, that the epileptic condition which existed on July 1, 1918, existed prior to issue of either of the contracts of insurance to the insured and that if such condition constituted a permanent total disability on July 1, 1918, then the same condition constituted a permanent and total disability prior to February 5, 1918; that the plaintiff could not assert as a permanent total disability a condition which existed prior to the issue of insurance because such insurance contemplated that the insured was an insurable risk against permanent and total disability and that he could not be heard to assert the condition existing prior to

the issue of the insurance constituted a permanent and total disability.

The insured has attempted and is now attempting to assert that even though permanently and totally disabled prior to the issuance of the insurance he may assert liability under a contract issued after such disability was incurred. In other words, the insured is attempting at the same time and by the same evidence to prove that he was permanently and totally disabled and also that he was not permanently and totally disabled.

The second contention of the insured, that the policies are incontestable after six months, is not involved in this case.

From what has been said above it is obvious that the Government is not attempting to contest the validity of the contracts issued. It is the position of the Government that the contracts were validly issued and that the insured had protection against permanent total disability during the time that these contracts were kept in force by the payment of premiums, but that no loss occurred during such time. Consequently, neither argument of counsel nor the cases cited with reference to the incontestability of insurance have any bearing upon the issues in this case.

The third argument of the insured, to the effect that the defendant is estopped to assert the invalidity of the policy, is not involved. As stated above, the Government is not asserting the invalid-

ity of the policy. It is admitted that the insured had two valid contracts of insurance, but it is denied that any loss was incurred during the lifetime of such insurance contracts by reason of which the insured is entitled to recover thereunder.

Only two points raised by the insured's brief remain:

(1) The refusal of the Court to give Instructions No. 1 and No. 2 requested by the insured. The material parts of the insured's requested instructions were included in the general charge of the Court to the jury, except the items that the policy was incontestable and that the defendant was estopped from asserting the insured was permanently and totally disabled prior to the issue of insurance. As has been shown above, the questions as to the incontestability of the insurance and the estoppel against the defendant to assert a permanent and total disability prior to the issuance of the insurance were not involved in this case, and there is no reason why the Court should have given instructions not pertinent to the issue even though such instructions might have clearly stated the law, if applicable.

(2) The refusal of the court to grant the motion of judgment for the insured or the special verdict. The special verdict, as has been shown above, in effect merely established the fact that the insured was in the same condition prior to the time he first secured the insurance in question as he was at the

time when he alleged a permanent total disability existed. In other words, the verdict of the jury merely found that the insured suffered no loss during the lifetime of his insurance contracts. On the special and general verdicts returned by the jury the Court properly entered judgment in behalf of the Government.

For the reasons above stated it is respectfully submitted that no error was committed in the trial and the judgment of the Trial Court should be sustained.

Respectfully submitted.

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